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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5122

CURTIS BROWNELL,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

ORIGINAL COPY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, the State of Illinois, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Illinois Supreme Court's opinion in this case. That opinion is reported at 79 Ill.2d 508, 404 N.E.2d 181.

JURISDICTION
(absence thereof)

Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1257(3). Respondent submits that the decision of the court below is not ripe for review by this Court. The final judgment in a criminal case is the sentence. Berman v. United States, 302 U.S. 211, 212 (1937). The Illinois Supreme Court has vacated petitioner's sentence of death, remanding the case for resentencing, and thus there has been no final determination of the merits of the case. Since litigation between the parties has not yet been terminated, review by this Court at this stage of the proceedings would be premature. Id. at 213.

QUESTIONS PRESENTED

Whether the decision of the Illinois Supreme Court that petitioner was not interrogated accords with the decisions in Rhode Island v. Innis and Michigan v. Mosley?

Whether the Illinois Supreme Court correctly concluded that petitioner had effectively waived his right to counsel, where petitioner met extensively with his counsel but later, knowingly waived counsel's presence?

Whether petitioner can be sentenced to death after confessing where there was no outstanding offer of leniency and petitioner also rejected such an offer?

Whether the mitigating factor listed in the Illinois death penalty statute as "extreme mental or emotional disturbance" adequately guides the sentencing authority where the statute further describes this factor as "not such as to constitute a defense to prosecution" and allows the introduction into evidence of any other relevant mitigating factors?

Whether the Illinois Supreme Court correctly concluded that a prosecutor's discretion to request a death sentencing hearing does not violate the eighth amendment where the prosecutor's discretion is guided by the statute and by the strength of his case?

STATEMENT OF THE CASE

Respondent wishes to add the following facts omitted by petitioner:

On the evening of April 1, 1978, at approximately 10:00 p.m., petitioner's counsel indicated that he wished to open negotiations with prosecutors regarding the death penalty and whether it would be sought in the case. (A. 108-109) At about 10:30 p.m. it was agreed among the parties that the following deal would be struck: if petitioner would give the police a complete, written statement concerning his role in the victim's death, the State would not seek the death penalty at his trial. (A. 122) Significantly, this offer was not open-ended; rather, the prosecutors expressly limited the offer so that petitioner would be required to give his statement "at that time, right now." (A. 122)

One of petitioner's attorneys then met with him alone for about fifteen minutes. (A. 109) A police detective was then summoned and informed, by petitioner and his counsel, that petitioner had declined the offer. (A. 109, 137) Petitioner's attorney later repeated to both the police (A. 109) and the prosecuting authorities (C. 276, 323) his client's refusal to accept the offered deal. After once again ascertaining that petitioner would refuse to speak to anyone but his lawyers, (A. 137) the parties left for the evening between midnight and 1:00 a.m. (A. 110-111)

Approximately one hour later, petitioner summoned the detectives assigned to this case. (A. 100) Once they had arrived at his cell, petitioner stated that he wished to give them a statement. When asked if his lawyers should be present, petitioner stated they should not be summoned because they would not "let me tell you everything I want to tell you." (A. 123) The police next asked petitioner why he had refused to confess earlier in the evening, when he could have bargained his way out of a possible death penalty. Petitioner said he rejected that "deal" because he wanted "to burn". (A. 111, 123, 143) Thereupon, after being fully admonished as to his fifth and sixth amendment rights, petitioner confessed to

murder. (A. 111) After confessing, he inquired if he had told the police "enough so that he could burn." (A. 112)

REASONS FOR DENYING THE WRIT

(In Addition To Lack Of Ripeness Mentioned In "Jurisdiction" Section, Supra.)

I.

THE DECISION OF THE ILLINOIS SUPREME COURT REFLECTS THAT PETITIONER WAS NOT INTERROGATED ON APRIL 2, 1978, IN VIOLATION OF RHODE ISLAND V. INNIS and MICHIGAN V. MOSLEY.

Prior to this Court's decision in Rhode Island v. Innis, ___U.S.___, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Illinois Supreme Court held that petitioner's right to remain silent and right to counsel were properly observed and rejected his argument that his waiver of these rights "was defective due to the 'affirmative, repeated efforts' of the detectives to obtain a confession." People v. Brownell, 79 Ill.2d 508, 521, 404 N.E.2d 181, 188 (1980). The court found that "the detectives did not coerce or threaten the [petitioner] into speaking with them" and that "most of the attempts they made to persuade the [petitioner] to confess were made in the presence of counsel." Id., 404 N.E.2d at 188. Respondent submits this decision is consistent with the principles set forth in Innis as well as those in Michigan v. Mosley, 423 U.S. 96 (1975), two cases delineating the rights previously established in Miranda v. Arizona, 384 U.S. 436 (1966).

In Innis, this Court concluded "that the Miranda safeguards come into play whenever a person in custody is subject either to express qeustioning or its functional equivalent." Innis, ___U.S. at ___, 100 S.Ct. at 1689, 64 L.Ed.2d at 307-8. The definition of interrogation extends "only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." Id. at ___, 100 S.Ct. at 1690, 64 L.Ed.2d at 308 (emphasis in original). The admissibility of statements obtained after the person in custody has chosen to remain silent "depends under Miranda whether his 'right to cut off questioning' was 'scrupulously honored.'" Mosley, 423 U.S. at 104. Nothing in Mosley suggests that all statements

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made subsequent to a decision to remain silent are to be excluded. Id. at 102-3. Rather, the decision makes clear that there are no per se proscriptions of infinite duration upon further questioning. Id.

The facts of the instant case belie petitioner's assertion that law enforcement officials did not scrupulously honor his rights, but affirmatively acted to obtain a confession and circumvent his right to counsel. With the exception of the showing of the photograph of the victim, Louise Betts, to petitioner after he requested counsel, no other police activity in any manner violated his constitutional rights. The trial court suppressed all testimony concerning the showing of the photograph to petitioner (A. 9) and that issue is not before this Court. That incident however took place at 2:15 p.m. on March 31, 1978, some thirty-six hours prior to petitioner's confession. During that thirty-six hour period, petitioner was represented by counsel and given numerous opportunities to discuss with counsel and others what actions to take. In fact, at no time during that thirty-six hour period was petitioner specifically questioned about the Betts' murder by any law enforcement authorities. (A. 140) Even though an initial violation of petitioner's rights had occurred, the effect of this violation was fully dissipated by lapse of time, repeated admonitions, and consultations with counsel so as to render the statement of April 2, 1978 a voluntary statement. Thus petitioner's right to cut off questioning was not violated. Mosley, 423 U.S. at 101 n. 8, 102-3.

The record is clear that the questioning of March 31, 1978 ended immediately upon petitioner's request for counsel. At 6:15 that evening, petitioner accompanied by counsel appeared in a line-up. (A. 134) While Detective Arbisi did advise petitioner that he had a right to talk to detectives either with or without his attorney (A. 135) this statement cannot logically be considered interrogation or an attempt to coerce petitioner into making a statement. Indeed, Detective Arbisi correctly advised petitioner that he could waive his attorney's presence and advise and speak with police officers

if he so desired. See Johnson v. Zerbst, 304 U.S. 458 (1938). Rights enumerated under the sixth amendment are rights personal to the accused and not to counsel. Faretta v. California, 422 U.S. 806 (1975).

The record supports the Illinois Supreme Court's holding that petitioner's rights to remain silent and to counsel were not encroached upon. Prior to and after the line-up on March 31, petitioner spoke with counsel for as long as he wished. (A. 140) He further acknowledged that from that evening until the next no one attempted to talk to him about the instant case. (A. 140) Petitioner spoke with counsel on several occasions on the evening of April 1 and indicated that these interviews lasted as long as he wished. (C. 383-4; A. 136, 140).

Finally, petitioner's own testimony clearly indicates that his decision to make a statement was made with knowledge that his attorney could be present and with a desire on his part to proceed without counsel:

> Q. When Detective Arbisi and Sergeant Packard came to the jail area that morning around two or two-thirty that morning on April 2nd, isn't it true that one of the first things they said to you was to ask if you wanted them to call your attorney?
>
> A. Yes.
>
> Q. And isn't it true that you said no, you didn't want them to call him because he would keep you from saying what you wanted to say?
>
> A. Yes.

(C. 389) Defendant also acknowledged that his Miranda rights were read to him before he gave a statement and that he understood these rights. (A. 142)

Petitioner claims that certain "tactics engaged in by the State" amounted to interrogation. Petition at 14. The People respond that these actions do not violate the precepts in Innis and thus review by this Court is unnecessary. For example, the placement of petitioner in "isolation" or "I-block" (A. 186) was not to elicit an incriminating response but to prevent petitioner from committing suicide. (A. 139) The police officers reasonably believed that a comment

petitioner had made referred to a possible suicide attempt. (A. 186) Informing petitioner that he could talk to the police with or without counsel present was correct advise (see p. 6-7, supra) given in the presence of his attorney, (A. 110, 131, 135, 141) certainly not a situation likely to evoke a confession.

Although petitioner complains that the State arranged for him to meet with his wife before allowing him to see his lawyer, this did not actually transpire. Rather, petitioner met with his wife after he conferred with his lawyer. (A. 136)

While it is true that the State offered to forego the death penalty if petitioner would give a statement, this was not an open-ended offer but limited to "that time, right now." (A. 122) Furthermore, petitioner refused the offer (A. 109, 123, 143) and when he later confessed, he himself indicated he was not doing so within the context of the offer. (A. 143) Petitioner had unlimited opportunity to assess with counsel the advantages and disadvantages of the State's offer and any possible coercive impact of this offer of leniency was dissipated by the advise of counsel. See Brady v. United States, 397 U.S. 742, 754 (1970). Not only was the State's offer not inherently unconstitutional, see id. at 755, no agreement was ever reached between the parties.

Thus, respondent submits that review by this Court is unwarranted as none of the State's actions amounted to interrogation. Furthermore, petitioner misconstrues this Court's holding in Innis. Innis not only addressed the meaning of "interrogation" under Miranda, it clarified when the Miranda safeguards are required:

> It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself. [Footnote omitted]
>
> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.

Innis, ___U.S. at ___, 100 S.Ct. at 1689, 64 L.Ed.2d at 307-8. Petitioner in this case was made completely aware of his Miranda rights by police and was advised by counsel throughout the period in question. His rights under Miranda, Mosley, and Innis were never infringed upon during the taking of his confession, thus obviating further review by this Court.

II.

THE ILLINOIS SUPREME COURT CORRECLTY DECIDED THAT PETITIONER'S RIGHT TO COUNSEL WAS PROPERLY OBSERVED.

A.

Petitioner Effectively Waived His Right To Counsel.

Petitioner urges this Court to consider whether an accused is cloaked with a sixth amendment right to counsel when, "during its interrogationl of the accused, the State offers" not to seek the death penalty in exchange for the accused's confession. Petition at 16. However, this is not the issue here, for it is clear from the record and opinion below that petitioner was afforded his right to counsel but later effectively waived it.

Petitioner cites no authority, for there is none, that prohibits one charged with a crime from voluntarily giving a statement to law enforcement authorities after he has been advised of his constitutional rights. Here petitioner was not only warned, but, other than an initial Mosley violation, see Brownell, 79 I11.2d at 519, 404 N.E.2d at 187, petitioner's request for counsel was honored and there was no interrogation. Petitioner met extensively with counsel (A. 136, 140) and nothing in the record supports his allegations that he was unaware of the consequences of his confession and the intricacies of the law.

---

1. Respondent submits, as previously discussed in Argument I of this brief, that petitioner was not "interrogated." See pp. 6-7 , supra.

Petitioner initiated the proceedings leading up to the confession (A. 142) and the statement was taken only after he expressed a desire to give it without the presence of counsel. (A. 143) Furthermore, petitioner explicitly refused the State's offer of leniency prior to confessing. (A. 143)

Respondent contends that the court below[2] correctly determined that petitioner waived his right to counsel in a knowing, intelligent, and voluntary manner. See Johnson v. Zerbst, 304 U.S. 458, 464-5 (1938). The facts and circumstances of this case, as discussed previously and as set forth in the Illinois Supreme Court's opinion, Brownell, 79 Ill.2d at 517-9, 404 N.E.2d at 186-7, demonstrate that petitioner requested, and consulted exensively with, counsel but later competently waived counsel's presence. Prior to recording petitioner's confession, Detective Arbisi asked petitioner whether he wished to have his attorney present (A. 111) and apprised him of his Miranda rights. (A. 112) Petitioner's earlier meetings with counsel as well as these warnings by the detective dispel any notion that petitioner's waiver of his right to counsel was not competent. Petitioner was well aware of his rights and had previously exercised them. Nothing prohibits him from later intentionally abandoning these rights. Therefore, since no violation has occurred, this Court should deny the petition for certiorari.

B.

The Allegedly Conflicting Decisions Cited By Petitioner Are Distinguishable On Their Facts.

Petitioner submits that the decision of the Illinois

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2. The trial court's finding that petitioner's confession was voluntary (A. 148, 211-2) encompasses an implied finding that petitioner was afforded counsel but later waived counsel's presence. (A. 211)

Supreme Court in this case that petitioner's right to counsel was not violated conflicts with the recent decision of United States v. Henry, ___U.S.___, 100 S.Ct.____, 65 L.Ed.2d 115 (1980) and United States v. Morrison, 602 F.2d 529 (3d Cir. 1979), cert. granted, 27 Cr. L. Rptr. 4122 (No. 79-395, June 30, 1980). However, both these cases are easily distinguishable on their facts.

In Henry, the accused, while in custody and after indictment, made incriminating statements to his cellmate, an undisclosed government informant. This Court found the admission of these statements at trial violated Henry's sixth amendment right to assistance of counsel. The fact situation in the instant case, wherein petitioner consulted extensively with counsel and later made a confession to known law enforcement officers, is entirely different than that in Henry where the accused made incriminating statements to an undisclosed government informant. Thus, petitioner's reliance on Henry is misplaced.

The facts in Morrison make it inapplicable to the case at bar. Morrison involved repeated forceful and wilful intrusions by government agents into a defendant's home. These intrusions occurred outside the presence of defendant's counsel and were designed to destroy her confidence in her attorney. Again, the facts in the case now before the Court clearly do not amount to a similarly egregious situation.

The decisions of the court below does not conflict with the decisions in Henry and Morrison, those decisions being distinguishable on their facts. Therefore, granting certiorari in this case would be inappropriate.

III.

NO PRINCIPLE OF LAW REQUIRES THE PRECLUSION OF A DEATH PENALTY SENTENCING HEARING MERELY BECAUSE PETITIONER CONFESSED AFTER REJECTING AN OFFER OF LENIENCY.

Petitioner asserts that due process and the attendant concept of fundamental fairness preclude capital punishment in his case. In so arguing, he places great emphasis on Santobello v. New York, 404 U.S. 257 (1971).

Santobello bears little, if any, application to this case. There, the defendant "'bargained' and negotiated" for a guilty plea to a lesser-included offense; the prosecution promised not to recommend a sentence. Id. at 262. An agreement was in fact reached between the parties. Because no such agreement was ever settled upon here, there is no agreement which could be breached or enforced, and Santobello is thus inapposite. The prosecutor here was never committed to a particular course of conduct.

A guilty plea is not rendered invalid because it resulted from a defendant's desire to avoid the possibility of the death penalty. North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970). Surely, there is nothing inherently unconstitutional about negotiations between the State and the accused wherein a defendant agrees to waive his constutitional rights in return for a promise by the prosecution not to seek the death penalty. But once again, since no agreement was ever reached between the parties in this case and the offer of leniency was not outstanding, petitioner's rights were not violated by the prosecutor's decision to request a special sentencing hearing.

The facts of this case as discussed throughout respondent's brief reveal that no trickery was employed by law enforcement officials to induce petitioner to forfeit his rights in the absence of counsel. The prosecutor and the police officers were straightforward at all times and petitioner apparently did not want the benefits of the State's offer. (A. 111, 123, 143) Therefore, review by this Court is not necessary.

IV.

THE ILLINOIS SUPREME COURT CORRECTLY DECIDED THAT THE ILLINOIS DEATH PENALTY STATUTE IS CONSTITUTIONAL.

Petitioner contends that two provisions of the Illinois death penalty statute, Ill. Rev. Stat., ch. 38, §§ 9-1(c)(2), (d) (1977), are unconstitutional. Respondent submits that the decision below, upholding the challenged

portions of the statute, does not merit review by this Court.

A.

The Statutory Mitigating Factor Of "Extreme Or Emotional Disturbance" Is Not Un-Constitutionally Vague.

The Illinois statute on murder and the death penalty provides, in part, as follows:

> (c) . . . Mitigating factors may include but need not be limited to the following:
>
> * * *
>
> 2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution . . . .

Ill. Rev. Stat., ch. 38, § 9-1(c)(2) (1977). Petitioner challenges this listed mitigating factor as unconstitutionally vague and claims that the phrase "extreme mental or emotional disturbance" does not sufficiently guide the sentencing authority. Respondent maintains that this factor does not violate any constitutional precepts.

The factor of extreme mental or emotional disturbance is one of five mitigating factors enumerated in the statute. Ill. Rev. Stat., ch. 38, § 9-1(c) (1) - (5) (1977). However, mitigating evidence is specifically not limited to these factors. Id.

The principles enunciated in this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), make clear that this section of the Illinois statute here challenged by petitioner is constitutional. The Georgia statute required the sentencing authority, either judge or jury, after finding a statutory aggravating factor existed, to "hear additional evidence in extenuation, mitigation, and aggravation of punishment . . ." at the presentence hearing. Ga. Code Ann. § 27-2503 (Supp. 1975). Another section of the law required the sentencer to consider "any mitigating circumstances or aggravating circumstances otherwise authorized by law . . . ." Ga. Code Ann. § 27-2534.1(b) (Supp. 1975). The scope of the mitigating circumstances was not delineated in the statute. Yet this Court rejected the petitioner's objection to the

broad scope of evidence and argument permitted at the presentence hearing:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. [Citation omitted.] So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision. [Citations omitted.]

Gregg, 428 U.S. at 203-4.

Respondent submits that the enumerated factor challenged here is clear on its face and can be easily applied to the evidence in a particular case. The factor of "extreme mental or emotional disturbance" is adequately limited by the language additionally describing it -- "although not such as to constitute a defense to prosecution." Further definition of this factor would impose unnecessary restrictions on the evidence.

If a statutory scheme that does not delineate mitigating factors is not found to be unconstitutional, then one which specifies certain factors, without limiting other mitigating evidence, is surely also not unconstitutional.

Petitioner's reliance on Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), is misplaced. The death sentence was reversed there because the court below did not apply a constitutional construction of an aggravating factor to the particular facts of the case. Nothing in Godfrey mandates that mitigating factors be as strictly defined.

Nor does the Illinois mitigating factor of "extreme mental or emotional disturbance" conflict with the decision in Lockett v. Ohio, 438 U.S. 586 (1978). Ohio's death penalty statute was struck down because it unduly limited the consideration of mitigating factors. The listing of "extreme mental or emotional disturbance" as a mitigating factor does not preclude the sentencing authority from considering any other relevant mitigating evidence. When read as a whole, § 9-1(c) of the Illinois statute permits "the type of individualized consideration of mitigating

factors . . . [held] to be required by the Eighth and Fourteenth Amendments in captial cases." Id. at 606. Therefore, review by this Court is unwarranted.

B.

The Illinois Death Penalty Statute Is Valid As A Matter Of Federal Constitutional Law And Conforms With Prior Decision Of The Supreme Court.

Section 9-1 of the Illinois Criminal Code, Ill. Rev. Stat., ch. 38, § 9-1 (1977), establishes a separate sentencing procedure which must be employed before a death sentence is imposed. This additional hearing is conducted only "where requested by the State." Ill. Rev. Stat., ch. 38, § 9-1(d)(1977). Petitioner attacks § 9-1(d), claiming that a prosecutor has "unlimited" and "absolute" discretion to request a hearing and that such discretion violates the eighth amendment. Respondent submits that the decision below, rejecting this argument, is correct. That decision relied on the prior Illinois Supreme Court decision of People ex rel. Carey v. Cousins, 77 Ill.2d 531, 540-3, 397 N.E.2d 809, 814-5, (1979).

The substance of petitioner's constitutional claim was rejected by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). Gregg involved an attack on the Georgia death penalty statute on the grounds that the Georgia procedures left to the "unfettered authority" of the prosecutor the decision as to which accused murders should be considered for capital punishment. This Court, in upholding the power of a local prosecutor to show mercy on a convicted murderer by not exposing him to a death penalty hearing, characterized this attack on prosecutorial discretion as being the product of a misinterpretation of Furman v. Georgia, 408 U.S. 238 (1972). Gregg, 428 U.S. at 199. See also Jurek v. Texas, 428 U.S. 262, 274 (1976); Proffitt v. Florida, 428 U.S. 242, 254 (1976). As the Court noted, there is nothing unconstitutional about a capital punishment statute which grants a prosecutor discretion to show mercy to an individual convicted of murder. Gregg, 428 U.S. at 199.

It is true that the opinion rendered in Furman refers to a need for standards so that the sentencing authority may focus on the particularized circumstances of the crime and of the defendant. See Gregg, 428 U.S. at 189. That need is satisfied by the Illinois statute which dictates that the judge or jury which sets the sentence must first consider a list of specific factors in aggravation and then a broad, open-ended list of factors in mitigation before finally determining punishment for the offender. Ill. Rev. Stat., ch. 38, §§ 9-1(b), (c) (1977). These factors provide specific, uniform standards to govern the imposition of captial punishment. But it is indisputable that a State's Attorney in Illinois, by charging the crime of murder and requesting the death penalty upon conviction, does not become a part of "the sentencing authority". That role is filled, under the statute, by either a judge or the jury.

This Court has, however, directly addressed the role that a prosecutor plays as an "actor" within the criminal justice system in seeking the imposition of capital punishment, by stating that:

> [t]he existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only, that in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the setencing authority would focus on the particularized circumstances of the crime and the defendant.

Gregg, 428 U.S. at 199.

Petitioner expresses a concern that the discretion which the statute grants to the State to request a special hearing will lead to arbitrary and capricious applications of the death penalty. He claims that "[i]t is inevitable that the personal beliefs or office policies of the 102

Illinois prosecutors will be the only basis of distinction between some of those on whom the death penalty is imposed and others who are passed over." Petition at 39. This attack on the integrity of the various State's Attorneys in Illinois is a misstatement of the law. The correct rule of law in Illinois is that it must be assumed that State's Attorneys will perform their duties in good faith and in accordance with the law. People ex rel. Hanrahan v. 1965 Oldsmobile, 52 Ill.2d 37, 284 N.E.2d 645 (1972), rev'd on other grounds, 409 U.S. 38 (1973).

Similarly, as a matter of federal constitutional law, the concurring opinion of Mr. Justices White, Burger and Rehnquist in Gregg, 328 U.S. at 224-25, specifically rejected as "untenable" the argument that prosecutors may utilize the death penalty to act out personal prejudice:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defedant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decision are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly 'similar.' If the cases really were 'similar' in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Likewise, an Illinois prosecutor, in requesting a death penalty hearing, will be motivated by the strength of his case. In Illinois there is only one offense of murder and "no distinction is made between capital and non-capital murder." People v. Brownell, 79 Ill.2d 508, 528, 404 N.E.2d 181, 189 (1980).

The fact that a prosecutor uses discretion at both stages of the bifurcated process, in deciding what offense to charge and whether to request a special hearing, does not render the process unconstitutional. The Illinois prosecutor's decision to request a death penalty hearing is similar to a Georgia's prosecutor's decision to charge a capital offense.

Furthermore, it is inaccurate to say that a prosecutor has no standards to rely upon in deciding when to request the death penalty procedure. In interpreting the statute, the Illinois Supreme Court has stated that "[u]nless the State's Attorney believes that there will be testimony which will persuade the jury that the requisite elements for a death sentence exist, he is unlikely to request a hearing." People ex rel. Carey v. Cousins, 77 Ill.2d 531, 543, 397 N.E.2d 809, 815 (1979). The statute lists seven separate factors in aggravation, at least one of which must be proven beyond a reasonable doubt before the penalty could be imposed. Ill. Rev. Stat., ch. 38, § 9-1(b) (1977). Thus the prosecutor, as is true of any litigant, is aware of what facts must be present and which burden of proof must be satisfied before he could successfully request capital punishment. The statute itself serves as the guide in determining which cases are appropriate for death penalty consideration.

Petitioner cites cases to this Court which, he claims, exhibit "discrepancies among local prosecutorial practice." Petition at 40. This is a highly speculative conclusion, not based on facts in the record. Nothing petitioner has presented indicates that the prosecutors' decisions in the cases he referred to were based on mere whim or caprice. Prosecutors, in deciding whether to request a death penalty hearing, are not precluded from considering the weight of mitigating factors they anticipate a defendant will present.

Respondent submits that the Illinois Supreme Court properly decided that the prosecutor's discretion to reqeust a sentencing hearing is sufficiently guided. Therefore, further review by this Court is unnecessary.

CONCLUSION

For all these reasons and because this case is not ripe for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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